EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANULTAP2016/0002

BETWEEN:

ANTIGUA COMMERCIAL BANK

Appellant/Employer

and

DENISE ARMSTRONG

Respondent/Employee

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Anthony Gonsalves	Justice of Appeal [Ag.]

Appearances:

Ms. C. Kamilah Roberts for the Appellant
Mr. Justin L. Simon, QC, with him Mr. Kwame L. Simon, for the Respondent

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2017: June 1;
2018: September 20.

Civil appeal – Labour Tribunal – Whether the court erred in granting interim payment order

The Antigua Commercial Bank ("the bank") filed a suit against Ms. Denise Armstrong ("Ms. Armstrong"), a former employee, for specific performance compelling Ms. Armstrong to sign a voluntary separation agreement, upon signature of which the bank would pay specified sums to her in full and final settlement of any and all claims and demands which Ms. Armstrong may have against the bank arising from her employment ("High Court Claim").

Ms. Armstrong filed a reference to the Industrial Court for compensation for unfair dismissal to include damages for the manner of her termination. The bank denied that Ms. Armstrong was unfairly dismissed; as such it denied any liability to pay any sum of money to Ms. Armstrong by way of compensation for unfair dismissal.

Ms. Armstrong also filed an application in the High Court seeking a declaration that the court decline to exercise its jurisdiction to try the High Court Claim ("jurisdiction application"). The bank thereafter filed an application in the Industrial Court for a stay of proceedings pending the determination of the jurisdiction application. Subsequently, Ms. Armstrong applied to the Industrial Court for an order that the bank make an interim

payment to her representing the severance package owed to her by the bank, pending the determination of the matters in the High Court.

The Industrial Court found that Ms. Armstrong had made out more than a prima facie case in respect of her severance entitlement and ordered the bank to immediately pay to Ms. Armstrong an interim payment representing her severance entitlement in respect of her employment whereupon the proceedings in the Industrial Court would be stayed pending the determination of Ms. Armstrong's jurisdiction application.

The bank appealed the decision alleging that the Industrial Court erred in granting the interim payment order.

Held: allowing the appeal; setting aside the interim payment order; and making no order as to costs, that:

1. In such circumstances, a court may make an order for an interim payment only if it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant for a substantial amount of money. For an applicant to satisfy the court that he would obtain judgment against the defendant for a substantial amount of money, something more than a prima facie case is required. The burden is a civil burden on the balance of probabilities.

   Rule 17.6 of the Civil Procedure Rules 2000 applied; Shanning International Ltd v George Wimpey International Ltd [1988] 3 All ER 475 applied; British and Commonwealth Holdings PLC. v Quadrex Holdings Inc. [1989] 3 QB 842 applied; Shearson Lehman Brothers Inc. v Maclaine Watson & Co. Ltd. [1987] 2 All ER 181 applied; **Her Majesty's Revenue and Customs v The GKN Group** [2012] EWCA Civ 57 applied.

2. The court had no material before it on which it could have been satisfied that Ms. Armstrong would have obtained judgment for a substantial amount of money on her claim for unfair dismissal. Unfair dismissal was alleged and denied and never established as a fact, nor was it established even that there was more than a prima facie case that Ms. Armstrong would obtain a judgment in her favour for unfair dismissal.

JUDGMENT

[1] MICHEL JA: This is an appeal against a decision of the President of the Industrial Court of Antigua and Barbuda made on 4th May 2016 ordering an interim payment of $693,096.55 to be paid immediately by the Antigua Commercial Bank, which is the appellant in this appeal, to Denise Armstrong, who is the respondent in this appeal.

Background

[2] The Antigua Commercial Bank is the oldest and largest indigenous bank in the State of Antigua and Barbuda and has over one hundred employees.

[3] Ms. Armstrong was a long-serving employee of the bank, having worked with the bank for 24 years between September 1991 and August 2015, and was the Assistant General Manager – Credit and Control at the time of the termination of her employment with the bank.

[4] In 2015, a dispute arose between Ms. Armstrong and the bank which culminated in the termination of her employment in August 2015, the filing of a suit against her in the High Court by the bank in December 2015, and the filing by her, also in December 2015, of a reference of the dispute to the Industrial Court. As required by sections 17(1) and 20(1) of the Industrial Court (Procedure) Rules 2015,[1] Ms. Armstrong filed a memorandum on 13th January 2016 setting out the full particulars of her case.

[5] In the suit brought by the bank against Ms. Armstrong, the bank alleged that there was a voluntary separation agreement between them under the terms of which the bank would pay to Ms. Armstrong the sums of $693,096.55 and $57,927.00 in full and final settlement of any and all claims and demands which Ms. Armstrong may have against the bank arising from her employment with the bank from September 1991 to August 2015. The bank alleged also that Ms. Armstrong demanded payment to her of the agreed sums but she refused to sign the bank's "standard voluntary separation agreement" releasing and discharging the bank from any and all claims and demands which she may have against it. The bank accordingly sought an order for specific performance compelling Ms. Armstrong to sign the voluntary separation agreement, upon signature of which the bank would pay the agreed sums to her.

[1] Antigua and Barbuda Statutory Instrument No. 61 of 2015.

[6] As stated in paragraph 21 of her memorandum of 13th January 2016, Ms. Armstrong's claim before the Industrial Court is for "compensation for her unfair dismissal to include damages for the manner of her termination".

[7] On 12th January 2016, Ms. Armstrong filed an application in the High Court (amended on 3rd February 2016) seeking a declaration that the High Court decline to exercise its jurisdiction to try the claim filed by the bank against her.

[8] On 17th February 2016, the bank filed an application in the Industrial Court for that court to stay its proceedings against the bank pending the determination by the High Court of Ms. Armstrong's jurisdiction application.

[9] On 17th March 2016, Ms. Armstrong applied to the Industrial Court for an order that the bank make an interim payment to her of $692,517.28,[2] representing the severance package owed to her by the bank, pending the determination by the High Court of the jurisdiction application made by Ms. Armstrong and/or the claim instituted by the bank against her. The bank opposed the application on the basis that the sum of $693,096.55 is not a severance payment entitlement of Ms. Armstrong, but is part of a voluntary separation agreement entered into between Ms. Armstrong and the bank, by virtue of which the payment to Ms. Armstrong of the sum of $693,096.55, and the further sum of $57,927.00, would release and discharge the bank from claims and demands by Ms. Armstrong arising from her employment with the bank.

[10] On 13th April 2016, the President of the Industrial Court heard the bank's stay application, together with Ms. Armstrong's application for an interim payment, and he gave judgment on 4th May 2016 ordering the bank to immediately pay to Ms. Armstrong the sum of $693,096.55 "representing her Severance Entitlement in respect of her employment by the [bank] between September 2, 1991 and August 10, 2015", whereupon the proceedings in the Industrial Court would be stayed pending the determination of Ms. Armstrong's

[2] This is the amount mentioned in the bank's letters to Ms. Armstrong and in its application to the Industrial Court, but the amount has been stated elsewhere to be $693,096.55, which is the amount that will be referred to throughout this judgment.

application in the High Court for the High Court to decline jurisdiction in respect of the dispute between her and the bank.

[11] The bank sought and obtained leave to appeal against the decision of the President of the Industrial Court and on 20th July 2016 the bank filed a notice of appeal against the decision on six grounds, challenging both findings of fact and findings of law made by the learned President and seeking an order that the interim payment order be set aside and the application for an interim payment be dismissed.

The grounds of appeal are as follows:

> "1. The Learned President erred in law in failing to distinguish between the payment of severance under the Antigua and Barbuda Labour Code as a statutory entitlement in cases of redundancy, the payment of an amount equivalent to severance as compensation for unfair dismissal and the payment of an amount equivalent to severance pursuant to a voluntary separation agreement and, further, in failing to apply this distinction in determining the application for interim payment.
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> 2. The Learned President erred in his characterization of the nature of the dispute between the parties where he stated that the *"parties agree the quantum of the Severance Entitlement component of the Severance Package. The unresolved issues involve questions (a) as to the entitlement of the Employee to the benefits, if any, over and above the Severance Package and (b) whether she was unfairly dismissed."* (paragraph 24 of judgment) This statement is an inaccurate summary of the dispute between the parties as it fails to take into account the affidavit evidence that there was a live dispute as to the validity and enforceability of the voluntary separation agreement.
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> 3. The Learned President erred in his factual analysis of the effect of the potential outcomes of the High Court and Industrial Court proceedings and in concluding that regardless of the outcome of the Industrial Court and High Court proceedings, the Respondent would be entitled to at least the payment of the "severance entitlement". The Learned President failed to give due consideration to alternative outcomes of success and failure, failed to draw the distinctions as highlighted in Ground of Appeal 1 above and failed to give due consideration to the fact that unfair dismissal must be proved by the Respondent and should not be treated as an inevitably.
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> 4. The Learned President erred in finding that the Respondent had made out more than a prima facie case in respect of her "severance entitlement" as this finding failed to take into account and apply the distinctions as highlighted in

Ground of Appeal 1 above and further appears to have been based on the erroneous findings of fact as highlighted in Ground of Appeal 2 and 3 above.

5. The Learned President erred in that he misapplied the principles governing the grant of an interim payment by failing to determine the likelihood of the Respondent obtaining judgment on the claim for unfair dismissal as pending before the Industrial Court.

6. The Learned President erred in making findings on disputed issues of fact and law which did not fall to be decided on the stay application or the interim payment application and which should only be determined at the trial of the matter. In particular, the Learned President found *"that the evidence discloses no binding precondition that the Employee must execute the release in question before the delivery of the severance package to her. In the circumstances, there is no good reason for the Employer to withhold the delivery of the Severance package"*."

[12] On 15th August 2016, the bank filed the record of appeal, together with written submissions in support of the appeal, and on 10th February 2017 they filed a supplemental record of appeal. Also on 10th February 2017, Ms. Armstrong filed written submissions in opposition to the appeal.

[13] The appeal was heard on 1st June 2017, with oral submissions being made by Ms. Kamilah Roberts (as counsel for the appellant) and Mr. Justin Simon, QC (as counsel for the respondent) to supplement the written submissions filed by the parties on 15th August 2016 and 10th February 2017.

[14] This appeal essentially challenges the decision of the President of the Industrial Court to award an interim payment of $693,096.55 to Ms. Armstrong "representing her Severance Entitlement in respect of her employment by the [bank] between September 2, 1991 and August 10, 2015".

Interim payment orders

[15] The starting point of the analysis of this challenge is an examination of the power of the Industrial Court to make an order for an interim payment and the principles underpinning the making of such an order.

[16] Section 10 of the Industrial Court Act[3] sets out the powers of the Industrial Court in relation to any matter before it. Section 10(1)(a) in particular gives the Industrial Court the power to, "make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination".

[17] This general power to make orders or awards, including an interim order or award, is made more specific in terms of interim payment awards or orders by section 37(1) of the Industrial Court (Procedure) Rules 2015, which states, "The Court may at any stage of the proceedings grant interim remedies including Declarations, Injunctions and the payment of specified sums of money". The section therefore gives the Industrial Court the power to order an interim payment at any stage of proceedings before the Industrial Court.

[18] The Industrial Court (Procedure) Rules 2015 do not set out the conditions to be satisfied by a party to the proceedings who is seeking an interim payment order. Section 7(4) of the Rules however provide that:

> "Where these Rules are silent on any procedural issue affecting the determination of any matter before it, the Court may be guided by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000".

This then allows the Industrial Court to turn to the Civil Procedure Rules 2000 ("CPR") to find the conditions to be satisfied in order for that court to order an interim payment. The relevant provision of the CPR is rule 17.6.

[19] Rule 17.6 of the CPR (so far as it is relevant) provides as follows:

> "(1) The court may make an order for an interim payment only if –
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> (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
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> (b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgment for any amount certified due on taking the account;
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> (c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;

[3] Cap. 214, Revised Laws of Antigua and Barbuda 1992.

(d) (except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs."

[20] Applying these rules to the facts of this case, it is clear that sub-rules (b) and (c) cannot be applied in this case, because no judgment or order had (at the material time) been obtained by Ms. Armstrong against the bank. Sub-rule (a) is also inapplicable because the bank did not admit liability to Ms. Armstrong on the claim giving rise to the interim payment application and order, which – it must not be forgotten – is a claim for compensation for unfair dismissal. Indeed, the bank has steadfastly denied that Ms. Armstrong was unfairly dismissed. They have also steadfastly denied that they have any liability to pay severance pay to Ms. Armstrong, because Ms. Armstrong's employment with the bank was not terminated by reason of redundancy. They also deny liability to pay any sum of money to Ms. Armstrong by way of compensation for unfair dismissal or by virtue of an agreement which Ms. Armstrong essentially disclaims, but claims to be entitled to a money payment under it. This leaves sub-rule (d), which indeed is the provision under which interim payment orders are usually sought and granted. Sub-rule (d) requires the court to be satisfied that if the claim (in this case a claim for unfair dismissal) went to trial, Ms. Armstrong will obtain judgment against the bank for a substantial amount of money or for costs. It is the interpretation and application of this provision which will therefore determine whether the President of the Industrial Court erred in ordering the bank to make an interim payment of $693,096.55 to Ms. Armstrong. The reference to 'costs' in the sub-rule will be ignored, because it has no relevance in the present case.

[21] The interpretation and application of this provision has been treated with in several cases before the English Court of Appeal, but it was in the case of Shanning International Ltd v George Wimpey International Ltd[4] that the English Court of Appeal settled on the two-stage process in meeting the requirements of the English equivalents to CPR 17.6(1)(d). The Court of Appeal held in Shanning that, on a proper construction of the English equivalent of sub-rule (d):

[4] 17 ConLR 83.

> "the correct approach to an application for an interim payment … is to consider the matter in two stages. First, whether if the action proceeds to trial, the plaintiff is likely to obtain judgment for a substantial sum, and at this stage the likelihood of a set-off or any other defence succeeding must be considered by the court. Second, if the court is so satisfied, whether it should order an interim payment and, if so, of what amount, and the court is again required to take any set-off or counterclaim into account."[5]

[22] In the case of British and Commonwealth Holdings Plc. v Quadrex Holdings Inc.,[6] decided the following year, the Court of Appeal affirmed the two-stage process for satisfying the court that at trial the applicant for an interim payment order would obtain judgment for a substantial amount of money. Sir Nicholas Browne-Wilkinson, in giving the principal judgment of the Court of Appeal in that case, also referred with approval to the case of Shearson Lehman Brothers Inc. v Maclaine Watson & Co. Ltd.[7] decided by the Court of Appeal in 1987, where the Court held that before the court could make an order for an interim payment of damages under Order 29 – which contains a provision materially identical to CPR 17.6(1)(d) – it had to be satisfied that the [applicant] would obtain judgment for substantial damages.

[23] In the case of **Her Majesty's Revenue and Customs v The GKN Group**,[8] decided over 20 years after Shearson Lehman Brothers Inc, Shanning International Ltd. and British and Commonwealth Holdings Plc, the English Court of Appeal confirmed its adherence to the two-stage process and emphasized that to get past the first stage, the applicant for the interim payment order must satisfy the court (to the standard of a balance of probabilities) that, if there were to be a trial on the material before the court at the time, he would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. The court said that it would not be enough if the court were to be satisfied that it was likely that the applicant would obtain judgment or that it was likely that he/she would obtain a substantial amount of money, the court had to be satisfied that he/she would obtain judgment for a substantial amount of money. The Court also affirmed the position which it had taken in Shearson Lehman Brothers Inc. that for an applicant for an interim

[5] As taken from the headnote.
[6] [1989] QB 842.
[7] [1987] 2 All ER 181.
[8] [2012] EWCA Civ 57.

payment to satisfy the court that he would obtain judgment against the respondent for a substantial amount of money, "[s]omething more than a prima facie case is clearly required, but not proof beyond reasonable doubt." Lloyd LJ emphasized that "The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden".[9]

[24] In the present case, the President of the Industrial Court did not express his satisfaction that if Ms. Armstrong's claim went to trial, she would obtain judgment against the bank for unfair dismissal, which is the claim she has before the Industrial Court upon which she pegged her application for an interim payment. Instead, the President of the Court appeared to base his interim payment order on the premise that, no matter which way the claim is determined – whether in the High Court or the Industrial Court – Ms. Armstrong will be awarded her "Severance Entitlement" or "Severance Package" of $693,096.55. Indeed, on the issue of the threshold requirement being met for making an interim payment order, the learned President stated (in paragraph 36 of his Decision) that he was satisfied, based on the affidavit evidence of the parties, that Ms. Armstrong "has made out more than a prima facie case in respect of her Severance Entitlement".

Position of the parties

[25] The bank's position on this issue is that the premise on which the Industrial Court based its order is flawed. They contend that the term "severance pay" is used to describe the payment to which an employee is entitled when his employment is terminated by reason of redundancy, as provided for in section C40 of the Antigua and Barbuda Labour Code ("Labour Code").[10] They contend that the term is also used to describe the payment of a sum of money equivalent to severance pay as compensation to an unfairly dismissed employee, as stated in the judgment of Floissac CJ in the case of Antigua Village Condo Corporation v Jennifer Watt.[11] They contend too that it may also be used to describe a payment in an equivalent amount made to an employee under a voluntary separation agreement.

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[9] At p. 187.
[10] Cap. 27, Revised Laws of Antigua and Barbuda 1992.
[11] ANUHCVAP1992/0006 (delivered 7th February 1994, unreported).

[26] The bank submitted that Ms. Armstrong's employment was not terminated by reason of redundancy and so she cannot be entitled to severance pay under the Labour Code. They submit that the right to severance pay is a statutory right contained in the Labour Code which does not provide for any general right to severance pay, but only a specific entitlement, in accordance with section C40 of the Labour Code, to severance pay upon termination of employment by reason of redundancy.

[27] The bank submitted that Ms. Armstrong could not be entitled to a payment equivalent to severance pay as compensation for unfair dismissal, as in the case of Antigua Village Condo Corporation v Jennifer Watt, because it was neither admitted nor established that Ms. Armstrong was unfairly dismissed or that she had made out more than a prima facie case that she would obtain judgment on her claim for unfair dismissal.

[28] With respect to the voluntary separation agreement in particular, the bank's position is that it agreed to pay to Ms. Armstrong a sum of money equivalent to severance pay under the terms of the agreement, but that Ms. Armstrong denied the validity of the agreement. They contend that, in any event, Ms. Armstrong's claim before the Industrial Court is not a claim to be paid under the voluntary separation agreement, but a claim for compensation for unfair dismissal, in which to succeed Ms. Armstrong must satisfy the court that she has more than a prima facie case that she would obtain judgment for unfair dismissal, which she has not done in this case.

[29] Ms. Armstrong's position in relation to her entitlement to the severance package is that there is no need to make any distinction between different uses of the term "severance pay". She contends that the bank agreed to pay to her her severance entitlement of $693,096.55 and she will be entitled to at least this amount from the bank no matter how the dispute between her and the bank concludes, so she should be paid this amount in the interim until the determination of the dispute.

Court's Analysis

[30] There is in my view no doubt that severance pay properly so called has a single meaning under the laws of Antigua and Barbuda, that is, the meaning contained in section C40 of the Labour Code, which is a payment to which an employee whose employment has been terminated by his employer for reasons of redundancy is entitled. Any other use of the term "severance pay" is but a nickname used to refer to a payment calculated in the same manner as severance pay.

[31] There is no allegation, or suggestion even, by anyone that Ms. Armstrong's employment with the bank was terminated by reason of redundancy and so the sum of $693,096.55 which the Industrial Court ordered the bank to pay to her as an interim payment cannot be justified on the basis that it represents severance pay due or payable to Ms. Armstrong by the bank.

[32] The interim payment awarded by the Industrial Court to Ms. Armstrong also cannot be justified on the basis that it is an amount due or payable to her (in whole or in part) as compensation for unfair dismissal, when unfair dismissal was alleged and denied and never established as a fact, nor was it established even that there was more than a prima facie case that Ms. Armstrong would obtain a judgment in her favour for unfair dismissal, with the very high threshold that is required to be met by a litigant applying for an interim payment prior to the determination of liability.

[33] The interim payment award also cannot be justified under the voluntary separation agreement because, as was submitted on behalf of the bank, Ms. Armstrong's claim before the Industrial Court was not a claim for payment under the voluntary separation agreement, but was a claim for compensation for unfair dismissal. In any event, even if Ms. Armstrong was able to overcome this hurdle, she would still have to satisfy the Industrial Court that the sum of $693,096.55 was an amount payable to her under a binding agreement with the bank as a settlement figure upon the termination of her employment with the bank. The bank submits that the sum of $693,096.55 is an amount which they had agreed to pay to Ms. Armstrong under a voluntary separation agreement

between them, which would release and discharge the bank from any and all claims and demands which Ms. Armstrong may have against them arising from her employment between September 1991 and August 2015. They submit that there can be no payment of a settlement amount by them to Ms. Armstrong without a consequential release and discharge of claims and demands against them by Ms. Armstrong.

[34] Ms. Armstrong's position on the other hand appeared to differ here from what it was before the Industrial Court. Before the Industrial Court, her position (as understood by the President of the Court[12] was that the voluntary separation agreement (which he referred to as "the Severance Package deal") was a "sham" intended to disguise her unfair dismissal, "by virtue of which she is entitled to compensation greater than the amount offered in the Separation Package". It would follow from this that Ms. Armstrong could not have been making a claim for a payment under that agreement. Before this Court, Ms. Armstrong appeared to give some validity to the voluntary separation agreement, with her position on the $693,096.55 agreed to be paid to her under the agreement oscillating between it being severance pay to which she is by law entitled and it being an amount agreed to be paid to her under the voluntary separation agreement, but with no obligation on her part to release the bank from claims by her arising from her employment with the bank.

[35] Of course, if the separation agreement is invalid, then there is no basis upon which Ms. Armstrong could demand or the Industrial Court could order (by virtue of that agreement) the payment to Ms. Armstrong of the sum of $693,096.55 which the bank agreed to pay to her under the agreement. If, however, the separation agreement is valid, then clearly the payment to Ms. Armstrong of the amount agreed to be paid to her by the bank as the price of the separation must release and discharge the bank of any further obligation resulting from the separation. The signature therefore of a document acknowledging that receipt of the sum of $693,096.55 is in settlement of all claims and demands arising from the termination of the employer–employee relationship between the parties cannot be gainsaid, and Ms. Armstrong could not be entitled to receive the payment but decline to acknowledge it for what it is.

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[12] See para. 24 of his decision.

[36] On these facts, the President of the Industrial Court could not have been satisfied that more than a prima facie case was made out to satisfy him that if Ms. Armstrong's unfair dismissal claim against the bank went to trial that Ms. Armstrong would obtain judgment against the bank and for a substantial amount of money; not that she is likely to obtain judgment for a substantial amount of money, but that on the material he had before him she would obtain judgment and for a substantial amount of money on her claim for unfair dismissal.

[37] I am of the view that the President of the Industrial Court fell into error when he appeared to treat the interim payment ordered by him of $693,096.55 as an amount which would in any event have to be paid to Ms. Armstrong by the bank. He did so because he lost sight of the fact that Ms. Armstrong's claim before the Industrial Court on which she sought an interim payment was for compensation for unfair dismissal, and that unfair dismissal of Ms. Armstrong was neither admitted by the bank nor even treated with by him as something on which he needed to be satisfied before he could make an interim payment order in her favour. In fact, in her application for the interim payment order and her affidavit in support, Ms. Armstrong did not even attempt to make out a prima facie case of unfair dismissal that would meet the high threshold established in the cases to satisfy a court that she would obtain judgment on her claim. The President of the Court seemed untroubled by this, however, because he had fixed his gaze on the wrong object. He was looking for a case being made out for entitlement to severance pay and not a case being made out for unfair dismissal.

[38] Even had there not been an obvious error on the part of the President of the Court in failing to address his mind to the material before him to seek to determine whether he was satisfied that Ms. Armstrong would obtain judgment on her claim for unfair dismissal, it would have been difficult to justify the making of an interim payment order in circumstances where there was clearly a dispute on both fact and law as to whether Ms. Armstrong was unfairly dismissed by the bank. This is the sort of case to which Pereira JA

referred when she said in Joseph Pinder v Trishel Wetherill[13] that "the interim payment procedure is not suited to cases of serious disputes on issues of fact or law".

[39] From this analysis of the relevant facts and applicable law, I am of the view that the President of the Industrial Court erred in his interpretation of the principles underpinning the making of interim payment orders and the application of these principles to the facts of this case.

[40] I do not find it necessary to dwell on the specific grounds of appeal and the submissions of counsel on each of them, since the grounds of appeal and counsel's submissions on them all come around to the question of whether the President of the Industrial Court erred in the making of an interim payment order in the circumstances of this case, the answer to which question flows from the view taken of the learned President's interpretation and application of the relevant principles.

Conclusion

[41] Based on the view which I have taken of the President of the Industrial Court's interpretation of the principles undergirding the making of interim payment awards and of his application of the principles to the material facts of this case, I would accordingly allow the appeal and set aside the Industrial Court's order that the bank do pay the sum of $693,096.55 to Ms. Armstrong representing her severance entitlement in respect of her employment with the bank between September 1991 and August 2015.

[42] Consequent on the setting aside of the interim payment order, I would also order that all proceedings between the parties arising from the termination of Ms. Armstrong's employment with the bank, whether in the High Court or the Industrial Court, shall proceed in accordance with the Industrial Court (Procedure) Rules 2015 and the Civil Procedure Rules 2000.

[13] ANUHCVAP2011/0041 (delivered 5th June 2012, unreported) at para. 6.

[43] In accordance with section 10(2) of the Industrial Court Act, I would make no order as to costs.

Louise Esther BIenman
Justice of Appeal

I concur.
Anthony E. Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar